BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LESLIE N. WALKER	)	
Claimant	)	
	)	
VS.	)	
	)	
CENTURY MANUFACTURING, INC.	)	
Respondent	)	Docket No. **1,038,041**
	)	
AND	)	
	)	
ST. PAUL TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the January 12, 2012 Post Award Medical Award by Administrative Law Judge John D. Clark. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument. The Workers Compensation Director appointed Joseph Seiwert of Wichita, Kansas, to serve as Board Member Pro Tem.

APPEARANCES

Phillip R. Fields of Wichita, Kansas, appeared for the claimant. Ali N. Marchant of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the post award record and adopted the stipulations listed in the Award.

ISSUES

Claimant is an inmate at the El Dorado Correctional Facility. While employed by respondent, a private manufacturing company whose facility is within the prison grounds, claimant alleged a work-related low back injury. Respondent denied claimant had suffered a compensable work-related injury but after a preliminary hearing the Administrative Law Judge (ALJ) found the claim compensable. On appeal, a Board Member reversed the ALJ's decision and found the claimant failed to meet his burden of proof that he had

suffered a work-related injury. The case proceeded to regular hearing and on August 21, 2009, the ALJ found the claim compensable and designated Dr. Pat Do as the authorized treating physician. On February 26, 2010, the Board affirmed the ALJ's Award.

On April 6, 2010, claimant filed an Application for Post Award Medical. Claimant was seeking medical treatment with Dr. Do. Respondent agreed such treatment was authorized and ultimately Dr. Do recommended that claimant be referred for a spinal surgery consult. Respondent selected Dr. Alan Moskowitz who recommended a transforaminal lumbar interbody fusion at L4-5 with decompression. Respondent declined to authorize the surgery. On March 21, 2011, claimant filed another Application for Post-Award Medical seeking the treatment recommended by Dr. Moskowitz.

After conducting a post-award medical hearing, the ALJ found Dr. Moskowitz to be persuasive and authorized Dr. Moskowitz as the claimant's treating physician for surgery and other treatment deemed necessary. The ALJ further ordered respondent to pay claimant's attorney fees.

Respondent requests review of whether claimant's current need for medical treatment arose out of and in the course of employment with respondent as well as whether the ALJ erred in ordering respondent to pay claimant's attorney fees.

Claimant argues the ALJ's Post Award Medical Award should be affirmed.

The issues for Board determination are whether claimant met his burden of proof that his current need for medical treatment is necessary to cure or relieve the effects of the injury which was the subject of the underlying award. And whether the ALJ erred in ordering respondent to pay claimant's attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

A brief recitation of the history of this claim is necessary. As noted, claimant is an inmate at a correctional facility. On August 17, 2007, after he helped unload a truck he then was sweeping a floor and was in a bent over position sweeping the dust into a dustpan. As he straightened up he twisted to empty the dustpan into the trash. While still bent over in a twisted position the dust or cleaning chemicals caused him to sneeze. When he sneezed he felt a pop in his low back. Claimant went to the prison clinic for his back pain but on his second visit additional treatment was denied because his back condition was due to a work injury. Claimant then sought treatment from respondent and was provided one visit with a doctor but then respondent denied claimant additional treatment.

Claimant received no treatment until after a preliminary hearing, when Dr. Patrick Do was authorized by the ALJ. Claimant received treatment from Dr. Do until a Board Member, on respondent's appeal from the ALJ's preliminary hearing order, found that claimant had failed to prove his injuries arose out of and in the course of his employment with respondent. Thereafter claimant again received no medical treatment. He was only able to have Ibuprofen or Tylenol for his pain.

Claimant then proceeded to regular hearing and on August 21, 2009, the ALJ found that claimant sustained an accidental injury that arose out of and in the course of his employment with respondent. The ALJ authorized Dr. Do as claimant's authorized treating physician. Respondent requested review and on February 26, 2010, the Board affirmed the ALJ's Award.

As previously noted, on April 6, 2010, claimant filed an Application for Post Award Medical. Claimant was seeking medical treatment with Dr. Do. Respondent apparently agreed such treatment was authorized. Claimant underwent physical therapy as well as several epidural injections. Ultimately, Dr. Do recommended that claimant be referred for a spinal surgery consult. Respondent then referred claimant to Dr. Alan Moskowitz, a board certified orthopedic surgeon.

Dr. Alan Moskowitz examined and evaluated claimant on June 16, 2011. The doctor reviewed claimant's medical records, MRI films and also took a history from him. Upon physical examination, Dr. Moskowitz found claimant has positive bilateral sacroiliac tenderness to palpation and also tenderness in the midline of the lumbar spine. Claimant received a clinical diagnosis of spinal stenosis. Dr. Moskowitz testified that a comparison of May 17, 2010, and July 18, 2008, MRIs revealed progressive degeneration of the disk and also more narrowing of the spinal canal.

Dr. Moskowitz diagnosed claimant as having a narrowing of the spinal canal called spinal stenosis and also some evidence of degenerative changes of his disk at L4-5. The doctor recommended a procedure to address both the spinal stenosis and degenerative changes at L4-5. Dr. Moskowitz opined that claimant was in need of a decompression of L4-5 or laminectomy of a disk. This procedure is called a transforaminal lumbar interbody fusion or TLIF.

Dr. Moskowitz opined:

> One of the reasons I recommend surgery is if someone has failed a fair amount of conservative therapy first, including -- I failed to mention earlier, he had six months physical therapy, which tended to aggravate this situation, as well as the various injections.[1]

[1] Moskowitz Depo. at 10-11.

On cross examination, Dr. Moskowitz agreed that the spinal stenosis and loss of disk space was not related to the accidental injury that occurred in 2007. But the doctor further explained:

> Q. My question is can you say within a reasonable degree of medical probability that the diagnosis you arrived at is causally related to Mr. Walkers's work injury from 2007?
>
> A. When you ask that causally related, I guess I have to -- I can't necessarily -- I'm not sure I can answer that with a "yes" or "no" answer, but I can explain it.
>
> Q. Okay. That would be fine.
>
> A. People as we age develop degenerative processes, spinal stenosis and degenerative disk disease being one of them. Most of the time they never develop any symptoms from these problems. However, an injury, an accident, a fall or whatever could cause a preexisting degenerative process to become symptomatic. And that's what I feel is going on here.
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> The injury did not cause the stenosis. The injury did not cause the disk to degenerate. They were there before, most likely. But what has happened is that the injury caused this to become symptomatic and to stay symptomatic, as best as I can tell.[2]

Dr. Moskowitz testified that while claimant was bending over and sneezed it caused his condition to become symptomatic.

Dr. John McMaster, board certified in emergency medicine, family practice, and as an independent medical examiner, examined and evaluated claimant on November 14, 2011, at respondent's attorney's request. The doctor reviewed claimant's medical records and also took a history from him. Upon physical examination, the doctor noted that claimant demonstrated exaggerated pain behavior with moaning and limitation when asked to perform squatting and flexing at the waist in an attempt to touch his fingertips to his toes. But Dr. McMaster agreed claimant was told not to perform any activities during the examination that caused him pain.

Dr. McMaster diagnosed claimant with nonspecific, non-differentiated low back pain, degenerative disk disease in the lumbosacral spine, hypertension and hypothyroidism. The doctor opined claimant's lumbosacral complaints and/or symptoms are subjective in nature and not correlated with any specific radiculopathy pattern or injury-related bony abnormality. The doctor further opined that claimant did not sustain any trauma-related injury, illness, or condition afflicting any major organ or organ system as a result of the sneeze at work. Based upon a reasonable degree of medical certainty, Dr. McMaster

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[2] *Id.* at 21-22.

opined that claimant's work-related injury did not cause or result in any temporary or permanent impairment.

Dr. McMaster concluded that there was no causal relationship between the diagnostic findings found on x-rays, MRIs and the work-related injury. Dr. McMaster further opined claimant has reached maximum medical improvement and no additional medical treatment is needed. Based upon the AMA *Guides*, Dr. McMaster placed claimant in the DRE Category I which is a 0 percent impairment. Dr. McMaster did not place any permanent restrictions on claimant and opined claimant is capable of performing his job duties.

On cross examination, Dr. McMaster agreed that claimant's work incident caused him to have and/or experience low back pain that was temporary and transient. And he further opined that claimant did not have sufficient objective findings in order to warrant an invasive surgery. He felt the proposed surgery would cause more harm to claimant's lower back.

Claimant testified that he is not able to walk two or three laps in the yard without making his back hurt worse and his feet go numb. He described his condition:

> My back burns down low, it's right around the belt line. It kind of feels like maybe a cramping pull type besides the burning action. I have a pain right in the bottom part of my calf that goes into my instep on my right foot. On my left foot, my big toe is numb right now. My heel kind of hurts a little bit, and basically that's it, and if I was scaling like they ask you to at the doctor's office, it would probably be a three, and I've taken three over-the-counter Tylenol at eight o'clock, so I have got Tylenol in me and it kind of helps a little bit, so without the Tylenol it would probably be a four or five as far as the pain.[3]

K.S.A. 44-510k provides that further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award. The controlling issue is whether claimant's present need for medical treatment for his low back complaints is directly and naturally related to the August 2007 accident. Claimant has the burden of proof to establish that his medical condition is a direct and probable consequence of the original work-related injury.

Claimant testified that his condition has never improved since the accident. Dr. Do, the authorized physician, provided conservative care but when that failed to improve claimant's condition, he recommended a surgical consult. Respondent referred claimant to Dr. Moskowitz who recommended surgery. Dr. Moskowitz noted that the work accident caused claimant's preexisting condition to become symptomatic and that the condition has

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[3] P.A.H. Trans. at 14-15.

remained symptomatic during the intervening years. Conversely, Dr. McMaster does not believe the sneezing incident caused anything other than perhaps a transient onset of pain. The Board agrees with the ALJ and finds Dr. Moskowitz' opinion more persuasive. The claimant has met his burden of proof to establish that his medical condition is a direct and probable consequence of the original work-related injury.

The Board is mindful respondent argues that claimant did not receive any medical treatment for approximately two years. Respondent further argues this indicates that claimant's current pain complaints are embellished and unrelated to the underlying accident. But the reasons claimant did not receive medical treatment for that time period were twofold. As an inmate claimant was unable to receive treatment at the prison infirmary because his injury was work-related. And on respondent's appeal from the ALJ's preliminary hearing order, a Board Member found that claimant had failed to prove his injuries arose out of and in the course of his employment with respondent. Based upon that decision, respondent did not provide claimant any further medical treatment. Accordingly, claimant was unable to access medical treatment although his back pain continued and he wanted treatment. The claimant then proceeded to litigate his claim as the only option in order to receive medical treatment. The facts do not support respondent's disingenuous argument.

After Dr. Do recommended a surgical consult, the claimant sent a letter to respondent's workers compensation carrier asking what type of monetary compensation and future medical treatment the carrier would be willing to provide if claimant chose not to have the surgery. Respondent argues this reflects claimant was willing to bargain for compensation using whether to have surgery as part of the bargaining process. The ALJ accurately noted why the claimant sent the letter:

> Q. I understand. It's a slow process. I guess I'm just trying to get at what your intent was as far as --
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> **THE COURT**: Well, this is the Judge. You are wanting -- if you were going to settle your case, you wanted to have enough money in the bank that if you ever needed future medical treatment, you could pay for it; is that correct?
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> A. [Claimant] That's it sir.
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> **THE COURT**: Pretty simple. Any more questions?[4]

The Board agrees with the ALJ's assessment that claimant was not using the potential surgery as a bargaining chip in an effort to receive compensation, but instead was trying to find out what medical treatment would be available if a settlement was pursued.

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[4] P.A.H. at 24

Moreover, respondent's argument is further deflated as claimant elected to proceed with the surgery in an attempt to alleviate his ongoing pain complaints.

Respondent next argues that the ALJ erred in awarding claimant's attorney fees. The Kansas Workers Compensation Act permits a claimant to request post-award medical benefits[5] and authorizes an award of attorney fees in connection with that request.[6] The purpose of the attorney fee statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which a fee could be taken.[7] The general purpose of allowing attorney fees in these situations includes the policy reasons that (1) attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved; and, (2) statutes allowing an award of attorney fees are not passed to benefit the attorney, but are passed to enable litigants to obtain competent counsel.[8] Thus, the Workers Compensation Act provides that an attorney who represents an employee is entitled to reasonable attorney fees for services rendered after the ultimate disposition of the initial and original claim. And if those legal services result in no additional award of disability compensation but result in an additional award of medical compensation or other benefits the director shall fix the proper amount of such attorney fees to be paid by the employer.

It should be noted that respondent did not appeal the amount of attorney fees and costs billed by claimant's attorney, but instead claims no attorney fees should be awarded. Respondent cites *Naff* [9] and argues that it is improper to award attorney fees now. The respondent argues if claimant receives fees in this proceeding he should be precluded from ever seeking disability compensation because he failed to litigate that issue at regular hearing. In the alternative, respondent argues if claimant is entitled to litigate the issue of his disability in a post-award proceeding he cannot recover fees now and potentially receive fees from an award of disability compensation in the future.

The respondent's arguments are inapplicable as the instant proceeding was solely for post-award medical treatment and not for disability compensation. And there is no statutory prohibition against an attorney receiving fees from the disability compensation awarded claimant and then receiving additional fees for services performed seeking certain

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[5] K.S.A. 2008 Supp. 44-510k(a).

[6] K.S.A. 2008 Supp. 44-510k(c) and K.S.A. 44-536(g).

[7] *Robinson v. Golden Plains Health Care*, No. 239,485, 2004 WL 2522324 (Kan. WCAB Oct. 25, 2004).

[8] *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 199, 786 P.2d 618 (1990).

[9] *Naff v. Davol, Inc.*, 28 Kan. App. 2d 726, 20 P.3d 738 (2001).

post-award benefits. In this instance claimant's attorney rendered services to claimant in a post-award hearing for additional medical benefits.

Moreover, the Board concludes that *Naff* is distinguishable from this claim. In *Naff*, the Court of Appeals held that under the facts presented in that particular case, an injured worker was not entitled to an award of attorney fees where medical treatment that was being sought following a final award was actually recommended before the final award was entered. The Court stated, in part:

> In this case, the Board was attempting to stop an apparent abuse of the workers compensation system. Instead of pursuing the medical treatment recommended by Dr. Ketchum in June of 1996, Naff proceeded to regular hearing claiming her condition was at maximum medical improvement. She received an award for permanent disability to both her arms and shoulders. Yet, a short time after receiving her award, she decided to pursue the surgery recommended prior to the award.
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> We recognize Naff's statutory argument concerning the elements of K.S.A. 44-536(g). However, we hold that in a case where medical treatment being sought was recommended prior to the issuance of the original award and the employee choose [sic] not to pursue that medical treatment, it is proper for the Board to require a change in circumstances of the employee's injuries in order to award attorney fees under K.S.A. 44-536(g). Any attorney fees associated with challenging the extent of medical compensation prior to the original award would not have been compensable under these facts. The Board properly recognized that immediately reopening the question, right after the disability determination award for no discernable reason, should not give rise to the awarding of attorney fees under our statutory setup.
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> Under the facts of this case, we hold the Board did not err in requiring a change in circumstances in order for the attorney to receive attorney fees under K.S.A. 44-536(g).[10]

In *Naff*, the Board was attempting to prevent an abuse of the workers compensation system. Conversely, in this claim the Board finds that claimant's request for additional medical treatment and post-award attorney fees does not constitute an attempt to abuse the system. In this case when the claim was determined to be compensable the claimant was awarded medical treatment. At that time there was no surgery recommended and, unlike *Naff,* the claimant had not declined any recommended treatment. After the authorized treating doctor referred claimant for a surgical consult and surgery was recommended a dispute arose over whether the claimant's condition was related to the underlying accident. The matter then proceeded to a post-award hearing. Accordingly, *Naff* is distinguishable for two reasons: first, claimant is not attempting to abuse the

[10] *Naff* at 732-733.

workers compensation system, and second, the circumstances changed following the underlying award in the claim. Accordingly, the Board affirms the ALJ's Post Award Medical Award that claimant's attorney is entitled to post-award attorney fees.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[11] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Post Award Medical Award of Administrative Law Judge John D. Clark dated January 12, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

Emailed to: Phillip R. Fields, Attorney for Claimant,
prfields@sbcglobal.net
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
amarchant@fleeson.com
John D. Clark, Administrative Law Judge

[11] K.S.A. 2011 Supp. 44-555c(k).